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HAROLD B. WILL

No. 605

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

WEST EDMOND HUNTON LIME-UNIT,
a body politic and corporate,
Appellant,

VERSUS

J. M. YOUNG and KATE YOUNG,
Appellees.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS

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March, 1955.

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Appellees, pursuant to Rule 16 move the appeal of appellants be dismissed on the ground that the question is so unsubstantial as not to warrant further argument.

The opinion of the Supreme Court of Oklahoma is reported[1], movants will not restate the facts contained in said opinion, except to supplement same to properly present our contentions.

The unitization statutes complained of were *repealed** and a new unitization act was passed by the Oklahoma Legislature and became effective May 26, 1951.[2]

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[1] 275 P.2d 305

* All emphasis supplied unless otherwise indicated.

[2] O. S. Ann., Title 52, Section 287.1, *et seq.*

Appellant does not complain of a breach of *its* contract, but contends the statute impaired the obligation of division orders held by the purchasers of oil from the unit and deprived such purchaser of their property without due process of law. *Such purchasers* are not complaining herein, none are parties. The division orders were not assignable, all were terminable at will and were terminated upon unitization.

The Supreme Court of Oklahoma sustained the constitutionality of this Act;[3] upon appeal to the Supreme Court of the United States, the appeal was dismissed.[4]

The appellants raised the constitutional question for the first time in their petition for rehearing, but the Supreme Court of Oklahoma did not consider the question of sufficient importance to discuss same.

Proposition I.

The Supreme Court of Oklahoma held that the unit operator was a trustee and was liable because it was guilty of a breach of trust. Such holding does not present a federal question.

Appellees were owners of royalty interests and had no voice in either the organization or management of the unit, or the selection of the unit operator.

The lessees had sole authority to select the unit operator, who was given *exclusive* control of the production and disposition of the oil from the wells in the unit.

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[3] *Palmer Oil Corp.* v. *Phillips Petroleum Co.*, 204 Okla. 543, 231 P.2d 997.

[4] 72 Sup. Ct. 842, 343 U.S. 390, 96 L. Ed. 1022.

The Supreme Court of Oklahoma held the Act was not unconstitutional because the royalty owners were not given representation, because "the lessees have an interest that is distinctive from that of the royalty owners, but it is not *adverse* thereto because the interest of the latter are dependent upon and must rise or fall with that of the lessees."

A substantial portion of the leases in the unit are owned by major oil companies who are also purchasers of oil. Sohio Petroleum Company (hereafter referred to as Sohio) was a lessee owning numerous leases in the unit. It was named by the other lessees as the unit operator.

The Supreme Court of Oklahoma held that the unit operator stands in a position similar to that of a trustee for the royalty owners.

From September 28, to December 17, Phillips Petroleum Company, who had gathering lines in the unit area, posted a price of $3.00 per barrel. The other purchasers, including Sohio (also the unit operator) continued to pay only $2.65 per barrel.

Numerous royalty owners, upon *learning* of Phillips' posted price of $3.00, made arrangements with the unit operator and Phillips Petroleum Company to purchase their oil at the increased price. The appellees could have made the same arrangements and received the increased price of $3.00 from Phillips and would had the trustee advise them of their right, or had they been given knowledge and an opportunity to do so.

The unit operator (Sohio) and the other purchasers of the unit oil wanted to continue purchasing at $2.65, and for that reason the unit operator did not notify the royalty owners of the Phillips' posted price, or take any action that might have given these royalty owners an opportunity to act.

The unit operator furnished monthly statements to lessees and the purchasers of unit oil, listing the *value* of all oil produced from the unit at $2.65 per barrel.[5] It knew Phillips paid $3.00 a barrel for the oil it purchased, thus the unit operator supplied false information.

This deception was practiced on appellees by Champlin Refining Company, who sent an invoice to appellees[6], containing the valuation (supplied by Sohio) of all production on the basis of a value of $2.65 a barrel. The value of the oil purchased by Phillips in December, 1948, was listed in both statements at $595,685.72, whereas, Phillips actually paid $676,608.17 for such oil. Champlin left blank the column in its invoice relating to the price it paid for appellees' oil. Such conduct constituted a breach of trust on the part of the unit operator and, in the language of the Supreme Court of Oklahoma, was "not in keeping with the duty of the trustee, and fell far short of the high duty owed by the trustee, and resulted in unconscionable gains to the trustee and the direct loss to the royalty owners affected."[7]

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[5] Record 85-51.

[6] Record 85-36.

[7] *Young* v. *West Edmond Hunton Lime Unit*, 275 P.2d 304, at p. 310.

A breach of trust is a question for state courts and does not present a constitutional question.

This Court has held that it is against its policy to decide constitutional questions "if the record presents some other ground upon which the case may be disposed of."[8]

Since the case has been decided by the Supreme Court of Oklahoma on the merits and a determination of the constitutionality of the repealed statute is not necessary to a determination of said cause, it clearly appears that there is no merit in appellant's appeal and should be dismissed[9],[10].

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[8] *Rescue Army* v. *Municipal Court of Los Angeles*, 67 Sup. Ct. 1409, 331 U.S. 549, 91 L. Ed. 1666.

[9] In *Light* v. *United States*, 220 U.S. 523, 538, 31 Sup. Ct. 485, 55 L. Ed. 570, this Court said:

> "The judgment was right on the merits, wholly regardless of the question as to whether the government had inclosed its property.
>
> "This makes it unnecessary to consider how far the United States is required to fence its property, or the other constitutional questions involved. For, as said in *Siler* v. *Louisville & N. R. Co.*, 213 U.S. 193, 53 L. ed. 758, 29 Sup. Ct. Rep. 451, 'where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued, and is not departed from without important reasons.' The decree is therefore affirmed."

[10] In *Berea College* v. *Kentucky*, 29 Sup. Ct. 34, 211 U.S. 45, 53 L. Ed. 81, this Court held:

> "Upon this we remark that when a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision. *Murdock* v. *Memphis*, 20 Wall. 590, 636, 22 L. ed. 429, 444; *Eustis* v. *Bolles*, 150 U.S. 361, 37 L. ed. 1111, 13 Sup. Ct. Rep. 131; *Giles* v. *Teasley*, 193 U.S. 146-160, 48 L. ed. 655-658, 24 Sup. Ct. Rep. 359; *Allen* v. *Arguimbau*, 198 U.S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622."

Proposition II.

The Supreme Court of the State of Oklahoma properly held that:

> **"A division order signed by a royalty owner before the unit was created referring to his own oil from his individual acreage then producing oil, is insufficient and ineffective to authorize the subsequently created unit to dispose of the royalty owner's percentage share of the oil in the unit production, or of any of the unit oil, to a purchaser not paying the highest price available in the field."**

The purchasers of oil from the unit, under the division orders, are not parties to this litigation, they do not present the constitutionality of the statutes, only the unit operator, who had no contract, is complaining.

The division order provided:

> "The Champlin Refining Company is hereby authorized, until further notice, to receive oil from the said wells for purchase from said parties severally in the proportions named, * * *."

The purchaser did not agree to buy, nor did the seller agree to sell. It was not a contract but merely an authorization, terminable at will by either party. No vested rights were created by the division order. *Texas Co.* v. *Pettit*, 107 Okla. 247, 220 Pac. 956, cited by appellants, did not involve the same question here presented, it only dealt with estoppel.

The area included in the unit was over 18 miles long; the unit operator could produce oil from any well in said unit; it could, and did, completely close down numerous wells which, after unitization, produced no oil. It was

not required to deliver oil to any purchaser at any lease. The division order only authorized the purchase of *oil from a particular lease.* After unitization the unit operator required both the royalty owner and the purchaser of the oil to accept unit oil several miles from the location of the lease. Thus it is clear that the division order could not control after unitization, and the royalty owner owed no duty to advise the purchaser of oil of the termination of the division order. The unitization of the area was notice to all parties. The Supreme Court of Oklahoma so held:[11]

> "Obviously, an authorization to receive individually owned oil for purchase from wells located on a particular tract of land by the owners of the oil produced therefrom is not an authorization to receive other oil elsewhere produced."

The Act further provides that if an owner did not take his share of the oil, the unit operator, as agent and for the account and at the expense of such person, is authorized to market and sell or itself purchase, at not less than the market price prevailing at the time of such sale.

In many instances a well would produce much more oil than its proportionate share, whereas other wells could be completely closed down, and for that reason it is clear that before an owner could take his share of oil, a new arrangement with the unit operator was contemplated by the Act. A division order is not assignable.

In *Palmer Oil Co.* v. *Phillips Petroleum Co., supra,* the Act was sustained by a five to four vote. In stating what

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[11] 275 P.2d 308.

the Act provided, the dissenting opinion stated that one operator would be selected and "that all oil produced from the entire tract, or from any one or several of the 72 separate tracts, would be marketed by the *one operator*—and the entire tract—was to be drilled and produced *and the oil marketed,* as if the aggregate tract constituted a single unit, covered by a single lease." The dissenting opinion was concurred in by four members of the nine-member Court. There is no language in the majority opinion indicating that any member concurring in the majority opinion placed any different construction on the power of the unit operator to market the oil.

Clearly, if the Act could authorize the Corporation Commission to divest a lessee of his right to produce the oil from the lease owned by him over the lessee's objection there could be no doubt but that the Legislature had the power to provide that upon unitization the division orders, which were terminable at will, could be, and were, terminated by unitization.

The briefs in the *Palmer* case, *supra,* did not make an issue of the construction placed on the Act by the dissenting opinion and this unit operator was not justified in ignoring the construction of the Act set out in the dissenting opinion, especially when the majority opinion does not indicate a contrary construction.

For the reasons stated appellees respectfully submit that this Court should either affirm said cause on its merits, or dismiss the appeal.

Respectfully submitted,

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Attorneys for Appellees.

March, 1955.

APR 6
HAROLD B. W

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BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OPPOSING MOTION TO DISMISS APPEAL.

Appellees argue two contentions in support of their motion to dismiss this appeal, namely (1) that no federal question is presented by the holding of the state court "that the unit operator was a trustee and was liable because it was guilty of a breach of trust" and (2) that the state court properly held that unitization automatically terminated division orders executed prior to the effective date of unitization.

Unquestionably, it was within the province of the Supreme Court of Oklahoma to determine whether or not the unitization statutes of that state made fiduciaries of units created thereunder.* However, in order to hold

* Subject only to the limitations imposed by due process, which are discussed on page 21 of our Jurisdictional Statement.

appellant guilty of a breach of trust in favor of appellees, it was necessary for the state court to dispose of division order contracts executed by appellees prior to unitization. This is exactly what the majority decision of the state court accomplished by the simple device of declaring the division orders nullified by unitization.

While the state court majority ignored or distorted many of the undisputed facts, they could not ignore these stipulated facts (R. 114), namely:

> A. That the appellees prior to unitization had executed division orders for the sale and delivery of their royalty oil to certain oil purchasers, and that these division orders "have been in full force and effect since date of first production from plaintiff's respective tracts."
>
> B. That appellees were paid for their royalty oil in accordance with said division orders by checks issued by the oil purchasers who held their division orders. Even during the period in controversy (which began nearly one year after the effective date of unitization) appellees received, accepted and cashed checks from the oil purchasers who held their division orders.

The state court majority fully recognized that, if the oil purchasers who held appellees' division orders were entitled to receive appellees' royalty oil, appellant could not be guilty of a breach of trust by reason of its failure to take and market appellees' royalty oil. Thus in Syllabus 1 of their decision* the majority stated (Jurisdictional Statement, page 25):

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* Under Oklahoma law, the syllabus is prepared by the court and states the point of law determined by the court, 12 Okl. Stat. Sec. 977.

> "It is the duty of the unit organization to distribute such allocated percentage to each such owner in oil if desired, or the proceeds thereof determined at the highest market price available, *in the absence of an agreement with any such respective owner for other disposition of his respective percentage share in the unit production.*"

To the same effect, the opinion states (Jurisdictional Statement, page 36):

> "We hold the statutes require the operator of the unit, in this case, the defendant, to account to all the owners of oil rights within the unit area for their respective portions or percentages of the unit production at the highest market price available at the time of such production under the circumstances that such owners have not received in kind their share of such production, *or have not expressly authorized the unit or the operator for the unit to deliver same to a particular purchaser.*"

Having made this holding, the state court majority was able to complete its decision by holding that the unitization statute had the effect of terminating, or nullifying, the division orders. This it did in Syllabus 4 (Jurisdictional Statement, page 26).

Thus, the holding that the division orders were nullified was absolutely necessary to the judgment of the state court against appellant.

It is this holding which violates both the impairment of contracts clause of Article I, Section 10, and the due process clause of the 14th Amendment to the Federal Constitution.

It is true, as noted by appellees, that appellant was not a party to the division order contracts. However, it is equally true that the liability imposed on appellant by the

state court judgment is predicated upon nullification of contracts between appellees and the oil purchasers who held their division orders. Had these contracts been respected as required by Article I, Section 10, the state court judgment against appellant could not have been rendered. This point is disposed of in appellant's jurisdictional statement (pp. 19 and 20).

In support of the state court holding, appellees make the tenuous argument that the unitization statute divests a lessee of his right to produce oil from the land covered by his lease, and therefore the legislature had the power to provide that unitization would terminate division orders. It is true that unitization vests in the unit the sole right to develop and operate lands within the unit area and thereby deprives each lessee of the right to operate under his own lease. However, unitization gives the lessee a substituted right by requiring that there be allocated to his land a fair and equitable percentage of all production from the unit area, and by giving to the owners of royalty and working interests in each tract of land, the absolute right to take and dispose of production allocated to that tract.

No such substitute right is available to the holder of a division order or other contract for the purchase of oil. If, as the state court majority held, unitization nullifies previously executed division orders, these contract rights are completely destroyed. No substitute right of any kind is available. As pointed out on pages 17 and 18 of our Jurisdictional Statement, the police power gives no basis for utterly wiping out these contracts without substitution.

Appellees also argue that the unitization statutes involved in this case were repealed, and a new unitization act enacted, on May 26, 1951. The point of this argument

is beyond us, since the new statute is identical with the old in all respects here pertinent.

In appellees' argument, particularly under proposition 1, they have not hesitated to misrepresent the facts of this case for the obvious purpose of misleading this Court, even as a majority of the state court were similarly misled. Appellees make the following statement on page 4 of their motion to dismiss:

> "The unit operator furnished monthly statements to lessees and the purchasers of oil, listing the value of all oil produced from the unit at $2.65 per barrel. It knew Phillips paid $3.00 a barrel for the oil it purchased, thus the unit operator supplied false information."

The monthly statements referred to are fully explained by an exhibit appearing in the Record at page 193, et seq., and by the deposition of the one witness who testified orally. (R. 87, et seq.) These statements were prepared in strict conformity with a procedure agreed upon by the oil purchasers in October, 1947—nearly a year before commencement of the period here in controversy. They related only to the settlement among such oil purchasers themselves for monthly over-runs, and provided expressly that such settlement be made at the last previous uniform purchase price. The Record shows that these statements were furnished only to the four pipe-line companies involved in the purchase of oil. Neither appellees nor any other royalty owner even knew of the existence of these statements until they were brought out on cross-examination by appellees of a witness for appellant.

Although appellees are well aware of these facts, and are well aware that no one was deceived or misled by these statements, appellees would have this Court believe

that the statements were issued as part of a scheme to defraud royalty owners.

Appellees also state that the unit operator and other purchasers of unit oil "wanted to continue purchasing at $2.65 per barrel, and for that reason the unit operator did not notify the royalty owners of the Phillips' posted price." This statement is pure fabrication, without the slightest support in the Record. The one witness who testified orally was an employee of unit operator, and his testimony is undisputed to the effect that the unit operator did nothing simply because the price paid by oil purchasers was not the concern of the unit operator.

The statements in the third paragraph on page 4 of appellees' brief are equally unwarranted and misleading.

While the motion to dismiss seeks to picture appellees as royalty owners who have been deceived and defrauded by the machinations of appellant, it is highly significant that neither J. M. Young nor Kate Young (nominal plaintiffs) nor any other royalty owner, appeared to testify in this case. The obvious explanation for this anomaly is that no royalty owner was in position to give any testimony that would aid the case of appellees, for the simple reason that none was deceived or defrauded.

When all these misleading statements are cleared away, and the case is viewed from the standpoint of the record, the statute and the decision, it will be apparent that the state court majority has construed the statute to impair the obligation of valid and subsisting contracts, thus giving rise to a substantial constitutional question within this Court's appellate jurisdiction.

We believe it will also be apparent that in reaching its decision the state court majority has, as pointed out on pages 21 through 24 of our Jurisdictional Statement, so

utterly disregarded statutory provisions and stipulations as to violate the due process clause of the Fourteenth Amendment and to warrant the issuance of a writ of certiorari.

We submit that appellees' motion should be overruled.

Respectfully submitted,

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